LIBRARY
SUPREME COURT, U.S.

MAY 7 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

~~No. 789~~ 52

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., AND W. H. LOPER,

Appellants,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION, WAH CHAN THOM, WILFRED CHONG AND LEONG NGET CHO,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT AND TERRITORY OF HAWAII

APPELLANTS' STATEMENT AS TO JURISDICTION

RHODA V. LEWIS,
Assistant Attorney General of Hawaii,
THOMAS W. FLYNN,
Deputy Attorney General of Hawaii,
C. NILS TAVARES,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
Statute involved	2
Date of the judgment and date of application for appeal	3
Nature of the case	3
Appendix 1—Act 104, Session Laws of Hawaii, 1943	12
Appendix 2—48 U. S. C. 641-645	15
Appendix 3—Opinion re applicability of Section 266 of the Judicial Code of the United States	18
Appendix 4—Dissenting opinion re applicability of Section 266 of the Judicial Code of the United States	24
Appendix 5—Opinion of the District Court	33
Appendix 6—Assignment of errors	44

Table of Cases Cited

Atcherley, In re, 3 U. S. D. C. Haw. 404	9
Balzac v. *Porto Rico*, 258 U. S. 298	9
Benedicto v. *West India & Panama Telegraph Co.*, 256 Fed. 417	10
Curran, In re, 4 U. S. D. C. Haw. 730	9
De Castro v. *Board of Commissioners*, 322 U. S. 451	8
Healy v. *Ratta*, 67 F. (2d) 554, 292 U. S. 263	6, 10
Heath, In re, 144 U. S. 92, 36 L. Ed. 358	10
Kendall v. *United States*, 12 Pet. 524, 9 L. Ed. 1181	10
McCart v. *Indianapolis Water Co.*, 302 U. S. 419	6
Maret, In re, 145 F. (2d) 431	9
Marshall, In re, 1 U. S. D. C. Haw. 34	9
Mookini v. *United States*, 303 U. S. 201	9
Moore v. *Fidelity and Deposit Co.*, 272 U. S. 317	6
Munoz v. *Porto Rico Light & Power Co.*, 83 F. (2d) 262	10
Phillips v. *United States*, 312 U. S. 246	10

Page

Porto Rico Light and Power Co. v. *Colom*, 106 F. (2d) 345, 308 U. S. 617 10
Query v. *United States*, 316 U. S. 486 10
Railroad Commission v. *Pullman Co.*, 312 U. S. 496 8
Smith v. *Wilson*, 273 U. S. 388 6
Soga v. *Jarrett*, 3 U. S. D. C. How. 502 9
Stratton v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10 6
Wilder's S. S. Co. v. *Hind*, 108 Fed. 113, 183 U. S. 545 9

STATUTES CITED

Act of February 13, 1925, 43 Stat. 936, c. 229, Section 13 7
Act 104, Session Laws of the Territory of Hawaii 1943, now constituting Chapter 31, Sections 1871-1876, inclusive, Revised Laws of Hawaii, 1945, pp. 281-282 2
Civil Rights Act (8 U. S. C. A. 41-43) 5
Constitution of the United States:
Fifth Amendment 4, 5
Fourteenth Amendment 4
Hawaiian Commission Message, Doc. No. 16, 55th Cong. 3d Sess., p. 162-4; House Report No. 305, p. 19 of Committee on Judiciary on H. R. 2972, 56th Cong. 1st Sess., which bill was later incorporated by the House into into S. 222, Hawaiian Organic Act (see House Report No. 549, 56 Cong. 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-4, 2025, 2123-4, 2133, 2189, 2191-4, 2388-9, 2397, 2398-2400 and 2441) 9
Hawaiian Organic Act, Section 86 (31 Stat. 141, c. 339; 35 Stat. 838; 42 Stat. 119; 48 U. S. C. A. 641-42, 643-45) 8
Judicial Code:
Section 128 (28 U. S. C. A. 225) 7
Section 238 (28 U. S. C. A. 345) 2, 7
Section 266 (28 U. S. C. A. 380) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 789

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., AND W. H. LOPER,

Appellants,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION, WAH CHAN THOM, WILFRED CHONG AND LEONG NGET CHO,

Appellees.

APPELLANTS' STATEMENT AS TO JURISDICTION

Ingram M. Stainback, Governor of the Territory of Hawaii, Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, appellants above named, pursuant to United States Supreme Court Rule 12, paragraph one, file this their statement of the basis

upon which it is contended that the Supreme Court of the United States has appellate jurisdiction:

A. The appeal herein is from a final amended judgment made and entered by a District Court of the United States specially constituted under section 266 of the Judicial Code, as amended (28 U. S. C. 380), which provides that a direct appeal to the Supreme Court of the United States may be taken from the final judgment or decree made by such specially constituted district court.

It is further provided by section 238 of the Judicial Code, as amended (28 U. S. C. 345), that a direct review by the Supreme Court may be had where such judgment or decree is rendered under section 266 (section 380 of Title 28 of the United States Code).

By the decision of the majority of the specially constituted three-judge court, convened to hear the above entitled cause, said section 266 was held to be applicable to this cause, which was a suit by plaintiffs to enjoin enforcement of a statute of the Territory of Hawaii alleged to be in violation of the Constitution of the United States. This opinion and the opinion dissenting on this point consider only the applicability of section 266 in the Territory of Hawaii. This is the third of three jurisdictional points considered *infra*, part K of this statement.

B. The territorial statute involved is Act 104, Session Laws of the Territory of Hawaii 1943, now constituting Chapter 31, sections 1871-1876 inclusive, Revised Laws of Hawaii 1945, pp. 281-282 (Appendix #1). The effective date of said statute was July 1, 1943. The validity of this entire statute is involved, by virtue of the judgment of the specially constituted district court holding the entire statute to be in violation of the United States Constitution.

C. The final amended judgment appealed from was made and entered on the 13th day of February 1948.

D. The petition for appeal was filed on March 31, 1948 and presented with an Assignment of Errors (Appendix #6) and allowed on April 16th, 1948.

E. The said final amended judgment appealed from permanently enjoined the governor of the Territory of Hawaii, Ingram M. Stainback, the attorney general of the Territory of Hawaii, Walter D. Ackerman, Jr., and the Superintendent of Public Instruction of the Territory of Hawaii, W. H. Loper, appellants herein, from interfering with the teaching by appellees herein, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association and Leong Nget Cho, of foreign languages on the ground or grounds that the pupils being taught have or have not passed any grades in the public schools or its equivalent or have or have not passed any tests in English composition or reading or are or are not of any certain age. The first three of said appellees were found to be eleemosynary corporations incorporated for the purpose of conducting schools for the education of children in the Chinese language. They hereinafter are called the school corporations. The last named appellee was found to be a teacher of Chinese.

Said judgment further permanently enjoined said appellants from interfering with the teaching by the above named appellees of foreign languages on the ground that any teacher teaching foreign languages has not been examined, or certified, by a board of examiners as to his versatility in the usage or idiom in either the Enlish language or foreign language or languages being taught.

Said judment and decree further permanently enjoined said appellants from attempting to enforce against the above named appellees, said Act 104 of the Hawaiian Legislature, enacted May 1, 1943, effective July 1, 1943 (Chapter 31, Revised Laws of Hawaii 1945, Appendix # 1).

F. The original bill of complaint was filed by the school corporations. It alleged that enforcement of said statute by said appellants would deprive the school corporations of their liberty and property without due process of law, and would deprive them of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. Injunctive relief was prayed for. The answer set up defenses in law and in addition to answering the averments of the complaint, further averred that the simultaneous pursuit at too early a grade of courses of study in dissimilar languages (as distinguished from mere familiarity therewith in and about the home) conflicts with the Territory's purpose of accomplishing universal education in the basic studies, and is contrary to the health and welfare of the children concerned, particularly when the languages are as dissimilar from English as are the oriental languages; further, that it is not necessary to the learning of a foreign language that a child undertake a course of study therein earlier than the fifth grade.

G. An application for a preliminary injunction was heard by a single judge of the United States District Court for the District of Hawaii who assumed for the purposes of his ruling that section 266 was inapplicable. Neither side then contended that it was applicable. Said single judge denied the application for a preliminary injunction on the ground that the record before the court did not present the petition of any parent, pupil, or teacher, that the school corporations were not then operating schools, their schools having been closed since December 7, 1941, and that in applying for a preliminary injunction the school corporations were not seeking to preserve the *status quo* but to undo it, which was not the purpose of such an injunction; also on the further grounds that the territorial statute carried no criminal penalties but was enforceable by an equity proceeding in

a territorial court, and the school corporations had no reason to fear a court of equity, that upon a question of an injunction against the enforcement of a law, the laws of the Territory were to be treated the same as those of a state.

H. Subsequently the "defenses in law" contained in appellants' answer were set for hearing before trial, together with a motion to dismiss the complaint. These defenses and the motion were denied by a single judge, to whom the cause had been transferred by reason of disqualification of the first judge hearing the cause. This judge decided to convene a three-judge court.

I. On the same day that the specially constituted three-judge court convened for the trial of the cause on the merits, an amended complaint was filed. This amended complaint joined as additional plaintiffs, besides the school corporations, two parents of prospective pupils and the above named teacher. The final judgment dismissed the complaint as to the parents on jurisdictional grounds, but allowed it as to the teacher as well as the school corporations.

The amended complaint sought a declaratory judgment and injunctive relief. It relied on the civil rights act (8 U. S. C. A. 41-43), as well as the Fifth Amendment. It prayed for a three-judge court, which was a prayer not contained in the original complaint. Prior to the filing of the amended complaint the three-judge court had determined that it would act as such.[1] The amended complaint contained a prayer for an injunction *pendente lite*, but this application was not renewed by motion or in any way pressed before the three-judge court.

[1] Upon the hearing of this question before the three judges all parties took the position that section 266 was applicable in Hawaii. The Bar Association of Hawaii, appearing as *amicus curiae* at the request of the court, took the position that section 266 was inapplicable in Hawaii. See reference to bar association brief in dissenting opinion (Appendix #4).

J. The case went to trial before the three-judge court, which received expert testimony on both sides, as well as other evidence and exhibits. By stipulation all proceedings and evidence on the hearing of the defenses in law and motion to dismiss were considered the same as though held before the three-judge court. After the trial was concluded three opinions were rendered, one by two judges upholding the jurisdiction of the specially constituted three-judge court to hear the cause (Appendix #3), an opinion dissenting on this point (Appendix #4), and an opinion on the merits (Appendix #5).

Thereafter the three judges concurred in amended findings of fact and conclusions of law, and entered an amended judgment thereon. It is from the final amended judgment that this appeal is taken.

K. Appellants respectfully show unto this Honorable Court the following matters of statutes and decisions, hereby admitting that grave doubts exist as to their right to direct review of the aforesaid judgment by this Court.

1. Since the application for a preliminary injunction was disposed of by a single judge on the original complaint, and not renewed before the three-judge court on the amended complaint, other than by a prayer for such relief which was not pressed before such three-judge court, the case then being set for final hearing, the question arises whether, irrespective of the question of applicability of section 266 in the Territory of Hawaii (on which the members of the three-judge court differed) the case in any event was a proper one for a three-judge court. *Moore* v. *Fidelity and Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10; *Healy* v. *Ratta*, 289 U. S. 701; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 420.

2. Section 128 of the Judicial Code (28 U. S. C. A. 225) provides that the circuit courts of appeal shall have appellate jurisdiction to review final decisions in the United States District Court for Hawaii in all cases. This is in contradistinction to their appellate jurisdiction over district courts generally, which does not lie where a direct review of the decision may be had in this court under section 238 of the Judicial Code (28 U. S. C. A. 345). This distinction was made by the Act of February 13, 1925, 43 Stat. 936, c. 229, which also provided in section 13 for repeal of "so much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii." Previously, since 1909, section 86 of the Hawaiian Organic Act had contained a specific provision that "appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts of the United States to the Supreme Court * * *" (35 Stat. 838; 42 Stat. 119).

The question arises whether the Act of February 13, 1925 requires that the appeal in this case be taken to the circuit court of appeals, rendering inapplicable in any event that part of section 266 which provides for direct review, irrespective of the applicability of that part of section 266 which provides for a three-judge court. Because the Act of February 13, 1925 was not considered by the trial court, appellants have submitted this appeal on the assumption that the holding by the trial court was that all of section 266 applied.

3. If the case was one in which a three-judge court would be required by section 266, notwithstanding the question raised in paragraph 1 above, and if a direct appeal can be had from a court in the Territory of Hawaii to this court

notwithstanding the question raised in paragraph 2 above, then the further question arises whether section 266 of the Judicial Code was adopted and made applicable to the United States District Court for the Territory of Hawaii by section 86 of the Hawaiian Organic Act (48 U. S. C. A. 641-642, 643-645, Appendix #2). Section 86 at all times since its original enactment (31 Stat. 141, c. 339) has provided that: "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." (48 U. S. C. A. 645, Appendix #2). Said section 86 also provides that the laws relating to jurisdiction of district courts of the United States and the manner in which they proceed shall govern the court created by said section 86 (48 U. S. C. A. 642, Appendix #2). The question turns on whether section 266 is such a law as was contemplated by these provisions.

One of the purposes of section 266 is to make interference by interlocutory injunction with state legislation a matter for the adequate hearing and full deliberation which a court composed of three judges is likely to secure. *Stratton* v. *St. Louis Ry. Co.*, *supra*. The statute therefore is based upon avoidance of needless friction with state policies, hence is based on the same principle which leads the federal courts to defer to the final authority of a state court to interpret statutes of the state. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941). This court has said that the federal district courts are to defer to the territorial courts in such matters. *De Castro* v. *Board of Commissioners*, 322 U. S. 451, 459 (1944).

That Congress intended to establish in the Territory of Hawaii, between the federal court created by the Hawaiian Organic Act and the system of territorial courts then existing and substantially by that act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states, was held soon after the enactment of the Hawaiian Organic Act. *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, 114-115 (C. C. A. 9th, 1901, aff'd 183 U. S. 545). This principle became established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall*, 1 U. S. D. C. Haw. 34 (1900); *In re Atcherley*, 3 U. S. D. C. Haw. 404, 421 (1909); *Soga* v. *Jarrett*, 3 U. S. D. C. Haw. 502, 506 (1910); *In re Curran*, 4 U. S. D. C. Haw. 730, 738 (1916).

Such judicial pronouncements as to the autonomy of the territorial system of courts in Hawaii are confirmed by the legislative history of the Hawaiian Organic Act. Hawaiian Commission Message, Doc. No. 16, 55th Cong. 3d Sess., pp. 162-4; House Report No. 305, p. 19, of Committee on Judiciary on H. R. 2972, 56th Cong. 1st Sess., which bill was later incorporated by the House into S. 222, the Hawaiian Organic Act (see House Report No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-4, 2025, 2123-4, 2133, 2189, 2191-4, 2388-9, 2397, 2398-2400, 2441.

This court has said that an adoptive statute, such as section 86 of the Organic Act above quoted, embraces subsequent changes in the law adopted "that are not obviously inapplicable." *Balzac* v. *Porto Rico*, 258 U. S. 298, 302; to the same effect, *In re Maret*, 145 F. 2d 431, 436, note 28 (C. C. A. 3d 1944); cf. *Mookini* v. *United States*, 303 U. S. 201, 205. This principle perhaps was overlooked in

the Puerto Rico cases relating to three-judge courts.[2] In any event the Puerto Rico insular courts do not have the same historical autonomous position as do the courts of the Territory of Hawaii.

Section 266 of the Judicial Code, though appropriate to Hawaii in its purpose to avoid hasty and ill considered interference with respect to statutes of the Territory, possibly was rendered partially inappropriate in Hawaii by the 1925 act repealing "so much of the Hawaiian Organic Act • • • as permits a direct review by the Supreme Court of cases in the courts in Hawaii" (Par. 2, supra). But even if a direct review is not allowable, the provision for a three-judge court still is appropriate. Review by a Circuit Court of Appeals of a decision of a three-judge court is not unheard of. *Healy* v. *Ratta*, 67 F. 2d 554 (C. C. A. 1st 1933), reviewed 292 U. S. 263; *Phillips* v. *United States*, 312 U. S. 246, 254; cf. *Query* v. *United States*, 316 U. S. 486. In *Smith* v. *Wilson, supra*, this court left open the possibility that it is not erroneous for three judges to sit even when the appeal must be to the Circuit Court of Appeals. In Hawaii a three-judge court apparently is the method provided for review of an order of the Interstate Commerce Commission, pursuant to the Act of October 22, 1913, 38 Stat. 220, c. 32, abolishing the Commerce Court,

---

[2] *Benedicto* v. *West India & Panama Telegraph Co.*, 256 Fed. 417 (C.C.A. 1st 1919); *Munoz* v. *Porto Rico Light & Power Co.*, 83 F. 2d 262 (C.C.A. 1st 1936), cert. den. 298 U. S. 689, 80 L. Ed. 1408, the Circuit Court of Appeals citing *Kendall* v. *United States*, 12 Pet. 524, 625, 9 L. Ed. 1181 and *In re Heath*, 144 U. S. 92, 36 L. Ed. 358, but not *Balzac* v. *Porto Rico, supra; Porto Rico Light & Power Co.* v. *Colom*, 106 F. 2d 345 (C.C.A. 1st 1939), cert. den. 306 U. S. 617.

yet an appeal to the Circuit Court of Appeals may be required by the 1925 Act, supra.

Dated at Honolulu, T. H., this 16th day of April, 1948.

Respectfully submitted,

WALTER D. ACKERMAN, JR.,
Attorney General of the Territory of Hawaii.

RHODA V. LEWIS,
Assistant Attorney General, Territory of Hawaii.

THOMAS W. FLYNN,
Deputy Attorney General, Territory of Hawaii.

C. NILS TAVARES,
Attorneys for Appellants.

APPENDIX I

Act 104, Session Laws of Hawaii 1943 (Chapter 31, Revised Laws of Hawaii 1945)

An Act Regulating the Teaching of Foreign Languages to Children

Be it Enacted by the Legislature of the Territory of Hawaii:

(Sec. 1871) Section 1. *Declaration of legislative findings.* It is hereby declared that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this Act shall be enacted.

(Sec. 1872) Section 2. *Definitions.* As used in this Act:

(a) "School" means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.

(b) "Public school" means a public school as defined in section 729 of the Revised Laws of Hawaii 1935.

(c) "Standard test" shall be the test which is so designated and determined by the department of public instruction from time to time from such tests as are generally recognized by educators.

(Sec. 1873) Section 3. (*Qualifications of pupils.*) No child shall be taught a foreign langauge in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years.

(Sec. 1874) Section 4. (*Qualifications of teachers; board of examiners.*) No school shall permit the teaching of any foreign language to any child under the age of fifteen unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. The commissioners of public instruction shall appoint one or more of such boards of examiners as may be necessary. Of the members of each such board, at least two shall be well versed in the usage and idiom of both the English language and the foreign language to be taught by the teacher to be examined, and the third shall be well versed in the usage and idiom of at least one of said languages. Such board shall

examine each applicant to teach such foreign language. If such applicant is found to be qualified pursuant to this section, such board shall so certify to the commissioners, who shall cause a certificate of such qualification to be issued to such teacher. No charge shall be made for such examination and certification. The expenses of such boards of examiners, including compensation, if any, allowed by the commissioners of public instruction, shall be paid out of any appropriations for the department of public instruction for general administration of teachers' salaries, or both.

(Sec. 1875) Section 5. (*Inspection by department of public instruction.*) Any supervising principal, or other duly authorized representative of the department of public instruction of the Territory, at any time during which such school is in operation, shall have power to attend any school, for the purpose of ascertaining whether the provisions of this Act are being complied with, and it shall be the duty of every person in charge of, or employed at, such school to permit such representative of the department at any such time to attend the classes and activities of such school for said purposes.

(Sec. 1876) Section 6. (*Proceedings to ensure compliance; duties of attorney general and county attorneys.*) In the event any school or any person shall be found to be violating, or failing to comply with any of the requirements of, this Act, or there shall be reasonable cause to believe that such school or person is violating, or failing to comply with the requirements of, this Act, the attorney general, at his own instance or at the request of the department of public instruction, shall institute appropriate proceedings in equity in the circuit court in which the violation occurs to enjoin the performance of any acts or practices forbidden by this Act, or to require such school or person to comply with the requirements of this Act. Jurisdiction to hear and dispose of all actions under this section is hereby conferred upon each circuit court, and each such court shall have power to issue such orders and decrees, by way of injunction, mandatory injunction or otherwise, as may be ap-

propriate to enforce the provisions of this Act. In the event any respondent or respondents shall fail or refuse to comply with any such order or decree, the court, in addition to any other powers hereby granted, shall have power to enjoin the operation and conduct of such school until and unless this Act is complied with or satisfactory assurance is given that this Act will be complied with. The county attorney of each county shall, at the request of the attorney general, conduct such proceeding in behalf of the Territory. All such suits shall be brought in the name of the Territory by the attorney general.

Section 7. (Saving clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected.

Section 8. This Act shall take effect upon July 1, 1943.

APPENDIX II

U. S. Code—Title 48

Territories and Insular Possessions (Pages 4173-4174)

(Sec. 86 of the Hawaiian Organic Act)

Sec. 641. District court; sessions; powers; terms.

There shall be established in the Territory of Hawaii a district court, to consist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of $10,000. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same

powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; July 31, 1946, c. 704, 60 Stat. 716.)

Sec. 642. Jurisdiction of district court; authority of officers.

The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

* * * * * * *

Sec. 643. Appointment and term of office of judges, district attorney, and marshal.

The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

* * * * * * *

Sec. 644. Salaries of clerk and reporter; deputy clerk.

A clerk of the district court shall be appointed as provided in section 6 of Title 28, at a salary to be fixed in accordance with section 558 of Title 28. The number and compensation of deputy clerks shall be fixed by the attorney general as in other judicial districts. The said district judges shall appoint a reporter of said court at a salary of $1,200 per annum. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; June 1, 1922, ch. 204, title II, 42 Stat. 614, 616; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1084.)

* * * * * * *

Sec. 645. Appeals.

Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

APPENDIX III

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT AND TERRITORY OF
HAWAII

CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO, *Plaintiffs*,

vs.

INGRAM M. STAINBACK, C. NILS TAVARES and W. H. LOPER, *Defendants*

Opinion of the Court Re Applicability of Section 266 Judicial Code of the United States

MCCORMICK, *District Judge*;

By the amended complaint in this action, three eleemosynary corporations duly organized for the purpose of conducting schools in the Territory of Hawaii for the education of children in the Chinese language, a pursuit they had been lawfully carrying on long prior to certain territorial legislation in part embodied in the Revised Laws of Hawaii, 1945, as Chapter 31, jointly with three personal plaintiffs, citizens of the United States of Chinese lineage and residents of the Territory of Hawaii seek an injunction to restrain appropriate territorial executive officers from enforcing provisions of Chapter 31, upon the ground that the questioned territorial legislation is unconstitutional and violative of the plaintiffs' liberty and property without due process of law in contravention of the 5th Amendment.

Subsequent to the denial of plaintiffs' motion for a preliminary injunction by the District Judge presiding at the

time and pursuant to the request of the plaintiffs stated in the amended complaint and confirmed in open court by the express desire of defendants, three accredited federal judges designated by District Judge Metzger, before whom the cause was then pending, assembled to finally hear and determine the suit in the District Court established in the Territory of Hawaii by Sec. 86 of the Hawaiian Organic Act, as amended. Title 48, Sec. 641, et seq., U. S. C. A.

At the outset of proceedings the suggestion was made that the three judge procedure in the federal courts is not applicable to the District Court established by Congress in the Territory of Hawaii and was therefore inoperative in the instant suit. Such suggestion poses an important and crucial question in the case at bar, namely, whether Sec. 266 of the Judicial Code of the United States, as amended, Title 28, Sec. 380, U. S. C. A., is applicable in the District Court in the Territory of Hawaii. We are of the opinion that it is applicable to the situation before the Court in the suit at bar.

The Supreme Court had before it in *Farrington v. Tokushige*, 273 U. S. 284 (1927) a situation to an extent similar to the instant proceeding in that there was involved an application for an interlocutory injunction to restrain territorial executive officers of Hawaii from attempting to enforce a Hawaiian territorial legislative act relating to foreign language schools. In that case, the Court impliedly decided that the District Judge had jurisdiction to hear and determine the right to an interlocutory injunction. However, even if it be assumed that the three judge requirement in Section 266 of the Judicial Code was thereby held to be not applicable to the proceedings in the District Court in Hawaii there under consideration, we think such conclusion does not solve the problem before us at this time.

Here we are dealing with the Statute as Amended, 43 Stat. 938, which in pari materia states

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

4k

And here we must also consider the question in the light of procedural innovations specifically established and currently relating to the district court of the United States for Hawaii. Title 48, Sec. 646, U. S. C. A.

Support of the argument of inapplicability of the three judge "procedural protection" against single judge injunctive process in the district court in Hawaii is predicated upon decisions pertaining to judicial procedure in Puerto Rico. *Benedicto v. West India & Panama Telegraph Co.* (C. C. A. 1, 1919), 256 Fed. 417; *Munoz v. Porto Rico Ry., Etc. Co.* (C. C. A. 1, 1936), 83 Fed. (2) 262. We think there is a wide difference between the basic governmental structure and identity of Hawaii and Puerto Rico. In the latter "possession" only certain statutory laws of the United States are applicable therein, Title 48, Sec. 734, U. S. C. A. whereas in the "territory" of Hawaii, The Constitution, and all the laws of the United States which are not locally inapplicable, are effective identically as "elsewhere" in the United States. Title 48, Sec. 495, U. S. C. A.

Indeed, the clear and basic governmental differences in the two political units and in their respective judiciaries is recognized as far back as 1919 where the Court of Appeals in the Benedicto decision stated:

> "We have no occasion to inquire whether Section 266 might not apply to continental territories more closely related to the United States than that of the possession or quasi territory of Puerto Rico."

Moreover, the Supreme Court in *Balzac v. Porto Rico*, 258 U. S. 298, and in *Downes v. Bidwell*, 182 U. S. at p. 305, so conclusively distinguishes the governmental characteristics of Puerto Rico and of Hawaii as to make the decisions relating to courts in Puerto Rico of no application whatever to the question under consideration in this Court.

All pertinent adjective prerequisites specified by the Supreme Court in *Ayrshire Collieries Corp. v. United States*, decided April 28, 1947, and in *Farrington v. Tokushige*, supra, necessary to make operative three judge participation in the instant suit have occurred. An interlocutory injunction has been sought and passed to a hearing in the

District Court at Honolulu and a substantial federal question of transcending limitations of the 5th Amendment to the Constitution has been sufficiently alleged in the Amended Complaint.

In our opinion, discussion of any different elements between "constitutional" and "legislative" courts is entirely beside the point of our inquiry and is a mere abstraction.

The suit at bar from its inception has been at all times in the same forum, namely in the District Court established in the Territory of Hawaii by the Congress of the United States. The jurisdiction of such Court, in the sense of its right and power to hear and determine causes and proceedings has been explicitly stated by the creative authority to be that of "district courts of the United States," no more and no less, and it is expressly required by Statute to proceed in the same manner as a United States District Court. Title 48, Sec. 642, U. S. C. A.

Undoubtedly, a statute which departs from the procedure traditionally employed in single judge tribunals, as Section 266 of the Judicial Code does, should in applicable situations be given "narrowness of scope", *Phillips v. United States*, 312 U. S. 246, at p. 251, and must be construed "as an enactment technical in the strict sense of the term and to be applied as such" but if it be admitted, as it must, that the District Court in Hawaii has jurisdiction to consider and decide suits seeking to have territorial legislative acts declared unconstitutional, it does violence to the Congressional intent, if not to the words used in the last sentence of Amended Section 266, to hold that the federal district judges in Hawaii have prerogatives and larger powers to enjoin statutes of general application in the sensitive local area involved than those of other federal courts. We think such construction is not imperative and in the light of the language used, and the manifest congressional intent, it should be avoided.

Nor do we think that there is any need to philosophize or surmise why Congress, in dealing with situations in Hawaii, invested or restricted Courts which it continued or established there, or which it established in other territories or possessions of the United States, with dissimilar

procedural methods in disposing of injunction applications which seek to restrain the operation or enforcement of territorial Statutes upon the ground of repugnancy to the Constitution of the United States. There can be no doubt that Congress has paramount and plenary authority to legislate in all matters appropriate to the people of the territory of Hawaii—*Inter-Island Co. v. Hawaii*, 305 U. S. 306.

If there had been any reason in the *Farrington v. Tokushige litigation* to doubt that the intent of Congress that the scope and composition of the District Court of the United States of Hawaii should be, with relation to provisional or final remedies in suits for injunction to restrain local legislation upon the ground of unconstitutionality, the same as in Federal District Courts throughout the States, the uncertainty has been expressly and clearly removed by subsequent specific Congressional legislation, Title 48, Section 646, U. S. C. A., F. R. C. P. 1, 65 (e).

There being no authoritative ruling to the contrary, there is sound reason to conclude that the "mischief" which Congress sought to remedy by enacting and amending Section 266 of the Judicial Code impends in Hawaii similarly as it does in the States.

The chief obstacle to applying the "procedural protection" of Section 266 of the Judicial Code to Hawaii appears to be the repetitive use of the word "State" in the Statute. But we think that when the civic aspects of the situation are considered, the "procedural protection" of the public interest in the mind of the law-making agency connotes a meaning of any separate political community such as the Territory of Hawaii as well as those political subdivisions of the Nation known as States of the Union.

In *Talbot v. Silver Bow County*, 139 U. S. 438 (1890) the Supreme Court had occasion to interpret the meaning of the word "State" in an act of Congress relating to the right of the Territory of Montana to assess a tax on National Bank Stock—whereas under the literal terms of the Act in question, only "States" were given authority to tax such stock.

In holding that the territories possess the same power of taxing National Banks which States enjoy the Court said:

At page 441: "In this section no express reference is made to Territories; States only are mentioned. Tested by the letter, the argument is short and clear. Congressional permission is essential; no permission is given to the Territories; therefore, Territorial taxation is unauthorized and void. Whatever may be the voice of the letter, the argument fails because the minor premise cannot be sustained. Can it be that Congress meant to give power to the States to tax, and to withhold that power from the Territories? Some plausible reason should be suggested before the intention is imputed to Congress of granting to an independent jurisdiction, such as a State, the power to tax one of its own instrumentalities, and at the same time withholding a like power from a political organization like that of a Territory wholly dependent upon Congress, and subject to its absolute supervision and control. Such is not the ordinary lesson of experience. If the matter in respect to which such an intent was imputed were wholly of interest to the States, or designed purely for the exercise of powers within the States then properly all general expressions in the statute might be limited to States, and the intent of Congress be supported and established by the character of the subject-matter of the legislation. The converse of this is true. The national banking system was national in its design, coextensive in its operation with the territorial limits of the United States, and intended to be the banking system for the whole country, Territories as well as States."

When we examine the several provisions of the Organic Act of Hawaii relating to the District Court, its jurisdiction, grant and limitation of powers, manner of appeals therefrom and the concomitant Rules of Federal Procedure operative therein, we perceive a unitary judicial system functioning, except as to tenure of the Judges, precisely as in the several States, and we conclude in line with the reasoning of the Court in the *Talbot* case, that the word "State" in Section 266 of the Judicial Code, as amended,

is not intended by Congress as in contradistinction to the Territory of Hawaii but on the contrary the requirement respecting the presence of three judges is mandatory in the suit at bar in the District Court of the United States for Hawaii.

It is so ordered—

———,
United States Circuit Judge;
(S.) PAUL J. MCCORMICK,
United States District Judge;
(S.) DELBERT E. METZGER,
United States District Judge.

APPENDIX IV

(PO v. STAINBACK, Civil No. 765)

DENMAN, *Circuit Judge,* dissenting:

The question here is whether Congress in enacting Judicial Code Section 266, as amended 28 U. S. C. 380, conferred on the territorial district courts created by it in Hawaii and Alaska the jurisdiction to act as three-judge tribunals in suits to enjoin territorial officers from enforcing territorial laws alleged to violate the Federal Constitution.

I dissent from the court's holding that Congress gave jurisdiction in such cases under Section 266 to its territorial courts. The Supreme Court in a series of decisions, culminating in Phillips *v.* United States, 312 U. S. 246, 248 et seq., holds that Section 266 is not "a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." It is there stated that that section is to be construed to avoid "a serious drain upon the federal judicial system *particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice.* (Emphasis supplied.) Unless it be strictly construed "Section 266 would defeat the purposes of Congress, as expressed by the Jurisdictional

Act of February 13, 1925, to keep within narrow confines our appellate docket. Moore *v.* Fidelity & D. Co., 272 U. S. 317, 321 . . . ."[3]

Briefly summarized, my dissent is to the court's failure to give a strict interpretation of Section 266 to the end that it will minimize the drain on the service to litigants of federal judges in drawing them to distant places and away from their resident courts and "keep within narrow confines . . . (The Supreme Court's) appellate docket."

No case could better than this illustrate the drain on federal judicial power in taking judges to distant regions. District Judge McCormick and myself in travel to and from Hawaii in the trial and subsequent conferences have been taken for several weeks from our needed services to our litigants in our respective courts. Also Judge Metzger spent several weeks in travel from Hawaii to and from San Francisco and in necessary conferences with us on the mainland. One of Hawaii's two district judges, Judge McLaughlin, was disqualified, thus requiring the calling from the mainland of Judge McCormick to complete a three-judge tribunal. Judge McCormick's court in the Southern District of California is so overcrowded with litigation that the Ninth Circuit Conference at its meeting in July 1947 requested of Congress that another judgeship be created for that district.

The court's opinion in so failing to apply the rule of the Phillips case has caused it (a) to inserf in Section 266 the

---

[3] So also in the recent case of Ayrshire *v.* United States, 91 L. ed. 1006, 1009 (April 28, 1947), where, under an analogous three-judge statute, three judges heard and had submitted to them the merits of the case. Because of illness, but two participated in the subsequent decision. Applying the rule of strict technical construction of the Phillips case the Supreme Court reversed, holding that the statute required that the cause not only should be heard but that it should be determined by three judges.

Other cases of strict construction of such a three-judge statute are Gully *v.* Interstate Nat. Gas Co., 292 U. S. 16, 18; Oklahoma Gas & E. Co. *v.* Oklahoma Packing Co., 292 U. S. 386; Moore *v.* Fidelity & Deposit Co., 272 U. S. 317; Smith v. Wilson, 273 U. S. 388; Ex parte Collins, 277 U. S. 565; Ex parte Williams, 277 U. S. 267; Ex parte Public National Bank, 278 U. S. 101; Rorick v. Everglades Drainage Dist., 307 U. S. 208; Ex parte Bransford, 310 U. S. 354.

words "or territory" after its eleven words "state" and (b) to construe the words "district court of the United States" not in their strict historical meaning as a constitutional court but to expand the phrase broadly to include territorial courts.

Particularly I disagree with this court's interpretation of the phrase "such suit" of the terminal clause of Section 266, cited in the fifth paragraph of its opinion. When the pertinent omitted portions of the section are included, the only questions here for consideration are made clear. That section provides

> "(Judicial Code, section 266, amended.) Same; alleged unconstitutionality of State statutes; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or "by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the

hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: . . .

It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

A. *The word "state" as used in Section 266 should be given a strict interpretation as applying to states in their sovereign capacity and hence not including such Territories as Hawaii and Alaska.*

The phrase "such suit" of the terminal clause of Section 266 refer to suits concerning action of a "state" as that word is used in its preceding eleven phrases:

1. "Statute of a state"
2. "Officers of such state"
3. "Pursuant to the statutes of such state"
4. "To the governor and to the attorney general of the state"
5. "Court of the state having jurisdiction thereof"
6. "Under the laws of such state"
7. "A stay in such state courts"

8. "Such state court"
9. "The Courts of the state"
10. "The attorney general of the state"
11. "The suit in the state courts"

Nothing could be further from a strict construction of these phrases than this court's decision which requires the addition of the words "or territory" to each of them.

Entirely apart from this violation of the rule of strict construction of the Phillips and other cases, supra, the Mann Elkins Act of 1910 (36 Stat. 539 et seq.), in which, in Section 17, Congress created the first functioning of the three-judge court of later Section 266, shows the contrary intent in its phraseology. In Section 17 the word "territory" does not appear. Elsewhere in that Act, in Sections 7, 11 and 12, the word "territory" is used in connection with the word "state" wherever that Act includes a territory within its provisions.

This court's opinion explains its disregard of the rule of strict construction of the Phillips case by stating that "the *mischief*, which Congress sought to remedy by enacting and amending Section 266 of the Judicial Code impends in Hawaii similarly as it does in the States." The Supreme Court disposed to the contrary a similar contention with respect to Section 266 in Ex parte Collins, 277 U. S. 565, 567. There was the same claimed unconstitutional "mischief" in the enforcement by municipal officers of a state statute. It was claimed, as here, that the words officers of a state should be given a broad meaning to include officers of a municipality of *a state*. The contention was rejected by the Supreme Court stating "The suit is not one to restrain 'the enforcement, operation, or execution' of a statute of a State within the meaning of Section 266. That section was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public." It is the action of a state in its *sovereign* capacity and not the action of lesser political subdivisions, such as counties, municipalities, and, here, territories, which lack such sovereign capacity, with which Section 266 is concerned. The Court, at page 567, quotes

and relies upon what Senator Burton said of the amendment to the Commerce Court Act which later became Section 266: "It evidently recognizes the superior degree of consideration and sanction which should be given to a state statute, and prevents hasty interference with the action of a sovereign state." 45 Cong. Rec. 7253.

It is obvious that many municipalities created by state legislatures have a larger population and greater property than the Territory of Hawaii. The mischief of unconstitutional action well could be greater when caused by such municipal officers than that by the territorial officers. Yet, the Supreme Court says (p. 568), "Despite the generality of the language, we think the section must be so construed" that it does not apply to the acts of officers of a state's municipality.

In view of the Phillips case it is unnecessary to review the many cases in which statutes containing the word "state" have been broadly or narrowly construed. A broad construction of the word "state" was given in the early decision of Talbot *v.* Silver Bow County, 139 U. S. 438 (1891), the sole case relied upon in this respect in this court's opinion. There it was held to include the Territory of Montana in a statute giving states the power to assess a tax upon national bank stock.

In contrast, in a strict interpretation of the word "state," is the subsequent decision of Wynne *v.* United States, 217 U. S. 234, 242. There the Supreme Court held that the Territory of Hawaii was not included in the word "state" in a statute (R. S. 5339) providing for jurisdiction in federal courts in cases of murder committed within the "admiralty and maritime jurisdiction of the United States, and outside of the jurisdiction of any particular state." The defendant in that case was tried in this court and found guilty of murder committed on a vessel while at anchor in Honolulu Harbor. The Supreme Court held that under this statute the word "state" did not include the Territory of Hawaii and that the harbor of Honolulu was outside the jurisdiction of any state.

The holding in the Wynne case is of greater significance because it distinguishes the liberal interpretation of the

word "state" in the Silver Bow County case, stating that that decision "was based upon the obvious intent of Congress, looking to the scope and purpose of the act," whereas the Congressional intent of R. S. 5339, providing for the jurisdiction of this particular territorial court, is given a strict interpretation of the word "state" as excluding the Territory of Hawaii.

In accord with the decision of Ex parte Collins that section 266 is confined to unconstitutional actions by states in their sovereign capacities and does not include the action of lesser political subdivisions, such as distant island territories, is the decision of the First Circuit in Benedicto *v.* West Indian & Panama Telegraph Co., 256 Fed. 417. There the court held that Section 266 has no application to the issuance of an interlocutory injunction restraining the enforcement upon constitutional grounds of an order of the Public Service Commission of Puerto Rico. The reasoning of the court is that the maintenance of the relationship of the states, as "independent sovereignties," to the United States is the purpose of this legislation. As stated by the court at page 419,

> "We think the leading idea of Congress was in deference to the supposed independent jurisdiction of states, as such, and to safeguard their laws against hasty and inconsiderate federal interference."

Again quoting the court at page 419,

> ". . . we think the provision in respect to three judges (Section 266) has reference to state statutes and Constitutions, because of the independent and peculiar relationship of the states to the federal government, and not to Porto Rico, and because the administration there of the three-judge provision would be locally inconvenient and practically inapplicable, and because it is not clear that Congress intended that interlocutory injunction questions should require the presence of three judges in primary equity proceedings in that Island."

B. *The strict construction of the Phillips case requires the words of Section 266 "district court of the United*

States" to be confined to constitutional district courts in the states and not to be liberally extended to include territorial district courts.

This court's opinion contends that because Congress in 48 U. S. C. 642 has given the district court of the Territory of Hawaii the same jurisdiction and powers as the constitutional courts in the states, the two classes of courts are in all respects identical. It ignores the contention, and cases supporting it, vigorously presented to us by the brief of the Bar Association of Hawaii,[4] that such identity of jurisdiction and powers does not make a territorial court a constitutional court.

Even in the absence of the established strict construction for Section 266 and considering the question de novo, the phrase "district courts of the United States" *without an addition expressing a wider connotation* does not include territorial courts.

Mookini *v.* United States, 303 U. S. 201, 205, was decided thirteen years after Congress enacted the present terminal clause of Section 266 upon which this court bases its opinion. There the question was whether the territorial court of Hawaii is included in the term "district courts of the United States". The Supreme Court held it was not, stating

> "The term 'District Courts of the United States,' as used in the rules, *without an addition expressing a wider connotation*, has its historic significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United

[4] The court requested the Bar Association to act as amicus curiae and brief for us the law with respect to the applicability of Section 266 to the territorial district courts. In response a very able brief was prepared and presented to us by the Association's president Mr. J. Russell Cades, and Mr. Edward Z. Buck. The brief, which covered much more of the historical development of Section 266 than does this dissent, has been of great assistance to its writer, who agrees with the argument and conclusions of these friends of the court.

States does not make it a 'District Court of the United States.' Reynolds *v.* United States, 98 U. S. 145, 154; The City of Panama, 101 U. S. 453, 460; In re Mills, 135 U. S. 263, 268; McAllister *v.* United States, 141 U. S. 174, 182, 183; Stephens *v.* Cherokee Nation, 174 U. S. 445, 476, 477; Summers *v.* United States, 231 U. S. 92, 101, 102; United States *v.* Burroughs, 289 U. S. 159, 163 . . ."

So also of the Territory of Alaska. In its Enabling Act of 1884 the Alaska district court was given "the civil and criminal jurisdiction of district courts of the United States." One McAllister, appointed to the Alaska district court by and with the consent of the Senate was removed by President Cleveland under a statute (R. S. 1768) giving him the power to suspend any civil officer so appointed "except judges of the courts of the United States." McAllister sued for his salary claiming that he remained in office because the district court of the Alaska territory is one of "the courts of the United States," from which he could not be so suspended by the President. In McAllister *v.* United States, 141 U. S. 174, the Supreme Court denied him his salary. It held that, although the Alaska court was "invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon" (p. 179), it was not one of the "courts of the United States" since that phrase was used in Section 1768 "with reference to the recognized distinction between courts of the United States and merely territorial or legislative courts" (p. 185).

This court of three judges should have held that Section 266 gave it no power to proceed with the instant litigation. The case should have been tried by a single judge as in the case of Farrington *v.* Tokushige, 273 U. S. 284, where a similar Hawaiian school law was held unconstitutional. While the question of jurisdiction of the single judge was not raised in that case, I am of the opinion that no error of the Supreme Court in that regard lurked in its record.

Since the court's decision, at least for the time being, is the law of the case, I am required by the Ayrshire case,

supra, to participate in the adjudication of the merits of the challenge of the constitutionality of the territorial statute.

(S.) WILLIAM DENMAN,
United States Circuit Judge.

APPENDIX V

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT AND TERRITORY OF HAWAII

CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, WAH CHAN THOM, WILFRED CHONG, and LEONG NGET CHO, *Plaintiffs,*

vs.

INGRAM M. STAINBACK, NILS C. TAVARES, and W. H. LOPER, *Defendants*

Before Denman, Circuit Judge, and McCormick and Metzger, District Judges

Attorney for Plaintiffs: Rhoda V. Lewis, Acting Attorney General, Iolani Palace, Honolulu, Hawaii; Thomas W. Flynn, Deputy Attorney General, Iolani Palace, Honolulu, Hawaii.

Attorney for Defendants: W. Y. Char, Bishop National Bank Bldg., Honolulu, Hawaii; A. L. Wirin, Suite 416 Douglas Building, 257 South Spring Street, Los Angeles, California.

DENMAN, *Circuit Judge:*

Plaintiffs seek a judgment declaring unconstitutional Act 104 of the Hawaiian Legislature enacted on May 1, 1943,

entitled "An act regulating the teaching of languages to children," now embodied in Hawaiian Rev. Law, Chapter 31. They also seek to enjoin the defendants Superintendent of Public Instruction, the Governor and the Attorney General from their enforcement of that Act.

Two of the plaintiffs are Wah Chan Thom, a Hawaiian citizen of Chinese ancestry, having three children in the public schools of Hawaii, one 13 years of age and in the seventh grade, one eight years of age and in the third grade, and one three years of age, and Wilfred Chong, of the same citizenship and ancestry, having a child of thirteen in the sixth grade and one of nine in the third grade, and one of five attending kindergarten. They seek to have their children taught the Chinese language without the restrictions imposed by the challenged Act.

The remaining plaintiffs are a teacher of the Chinese language, Leong Nget Cho, a Hawaiian citizen, and the three Hawaiian eleemosynary corporations chartered to teach and seeking to teach the Chinese language.

The evidence adduced establishes that each of the corporation plaintiffs has a matter in controversy exceeding, exclusive of interest and costs, the sum of $3,000 required by 28 U. S. C. 41 (1). As to the other plaintiffs the amended complaint has no statement as to the amount in controversy. The court sua sponte notes that the jurisdictional amount of sec. 41 (1) is required of all civil suits litigating constitutional questions except those stated in the succeeding 27 paragraphs. No one of these gives the district courts jurisdiction of a deprivation of a right created by a *territorial* law, though paragraph (14) gives such jurisdiction to such a deprivation by a state law.[5] It thus seems that Congress

[5] "(14) Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, *or usage of any State*, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United

intends that a territorial invasion of the right in controversy involving less than $3,000 should have its litigation in the territorial courts.

We will therefore be required to dismiss the complaint as to the plaintiffs the teacher of Chinese and the parents and children, unless within twenty days herefrom the complaint be amended to contain allegations of the required jurisdictional amounts in controversy.

The striking provision of the Act is the extraordinary definition of what constitutes a school in which a foreign language is taught. Section 1872 provides,

> "Definitions. As used in this chapter: 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice."

The Hawaiian statute prohibits the teaching of any language other than English in such manner to *all* children who have not passed the first four grades of public or private attendance. Such attendance is required in the school year after the child has reached six years of age. (Haw. Rev.

States. (Mar. 3, 1911, ch. 231, sec. 24, par. 14, 36 Stat. 1092)." (Emphasis supplied.)

Paragraph 1 of Civil Rights Act of April 20, 1871, 17 Stat. 13, in which the right is confined to an invasion by a statute of a *state* only. When codified in 1878 in the Revised Statute, sec. 1979, the form in which it is now cast in 8 U.S.C. 43, the right was redefined as including territorial statutes. However, even under the Revised Statutes the *jurisdiction* was specifically restricted to suits on *state* statutes. District Courts, R.S. 563, par. twelfth, Circuit Courts 629, par. sixteenth.

In this respect it also should be noted that the Supreme Court in Douglas v. Jeanette, 319 U. S. 157, 161, involving only a state statute, after stating the $3,000 amount need not be alleged or proved, cites R.S., sec. 1979, 8 U.S.C. 43, containing the words "or territory," as if the mere creation of the right conferred the jurisdiction. However, the Court finally places the jurisdiction on Section 41 (14) which does not contain the word territory.

L. Sec. 1830.) This means that no parent may have his child so taught before he has attended any public school and thereafter up to ten years of age at least. It is up to a later age if for sickness or some other reason he has not then passed the fourth grade. Thereafter the child must pass *each* succeeding grade through the eighth with a score "not lower than the normal" or reach the age of fifteen before he may so be taught a foreign language.[6]

Since the testimony is that a very large number of Hawaiian children of fifteen seek their own living and support at that age, it is apparent that as to most of them their parents must have taught them a foreign language before that time if one is to be acquired.

Defendants claim that we should not construe the definition of a school as applying to a Chinese speaking mother who daily teaches her two children the language of the home. Assuming this true, it certainly would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded.

The parents' right to have their offspring taught a foreign language is one of the fundamental rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments. A teacher of such languages in a Nebraska public school to children in the eighth grade or below cannot be deprived by the state legislature of the right to pursue that vocation. Meyer *v.* Nebraska, 262 U. S. 390, 400. The Supreme Court reversed a judgment denying an injunction restraining state officials from enforcing the above Nebraska

---

[6] "Sec. 1873. Requirements for pupil. No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years. (L. 1943, c. 104, s. 3.)"

law against such a teacher. Nebraska District *v.* McKelvie sub. nom. Bartels *v.* Iowa, 262 U. S. 404, 411.

The Circuit Court of Appeals for the Ninth Circuit held that an injunction should be granted against the enforcement of a Hawaiian statute regulating foreign language schools. In so doing it based its opinion on the following statement of the natural law of the relationship of parent and child from an opinion of Mr. Justice Harlan in Berea College *v.* Kentucky, 211 U. S. 45, 67, 68.

> "'The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperil the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property, especially, where the serves are rendered for compensation. But, even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties," and "to be free to use them in all lawful ways," . . . If pupils, of whatever race —certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such innocent purpose.'"

Farrington *v.* Tokushige, 11 F. 2d 710, 713, 714. On certiorari the Supreme Court, 273 U. S. 2, 84, sustained that decision, stating (pages 298, 299),

> ". . . Enforcement of the Act probably would destroy most, if not all of them (the schools); and, cer-

tainly it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue. . . .

The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. Meyer *v.* Nebraska, 262 U. S. 390; Bartels *v.* Iowa, id. 404; Pierce *v.* Society of Sisters, 268 U. S. 510. While that amendment declares that no *State* shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the Fifth Amendment—'no person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory. Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States, are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Pierce *v.* Society of Sisters, 268 U. S. 510, so relied upon in the Farrington case, sustained an injunction against enforcement of an Oregon statute forbidding the general education of children in Catholic schools. In granting such an injunction to such a school corporation the Court stated at page 535,

". . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations and therefore; it is said,

they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. *v.* Riggs, 203 U. S. 243, 255; Western Turf Association *v.* Greenberg, 204, U. S. 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax *v.* Raich, 239 U. S. 33; Truax *v.* Corrigan, 257 U. S. 312; Terrace *v.* Thompson, 263 U. S. 197.

The courts of the State have not construed the Act, and we must determine its meaning for ourselves . . ."

As in the case last cited, the Territorial courts of Hawaii, as the Oregon courts in the Society of Sisters case, "have not construed (the language school) Act, and we must determine its meaning for ourselves." It should be noted, however, that to the fundamental *parental right* to secure for a child a foreign language so recognized in the Berea College and the Society of Sisters cases—that is in the American isolationist period between 1909 and 1926—in today's world of the United Nations there has been added an equally profound *international need* for understanding between the peoples of a world of different tongues.

The defendants contend that in so construing the Hawaiian Act it must be done in the light of the Act's legislative finding concerning a harmful condition respecting the "average" Hawaiian school child. In this connection the case of Farrington *v.* Tokushige, supra, recognizes, at page 299, that exceptional language conditions prevail among Hawaiian children, warranting their pedagogical control within the limits of the Constitution. The legislative finding relating to the "average" of Hawaiian children is as follows:

"Sec. 1871. Declaration of legislative findings. It is hereby declared that the study and persistent use of foreign languages by children of *average* intelligence

in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this chapter are enacted. (L. 1943, c. 104, s. 1.)"

This finding regarding such "average" children is supported by the evidence. In brief, it is that in many instances Hawaiian children are required to frame their thoughts and to express them in three distinct languages. One is the language of the home, where a child, say of Portuguese parents, has all his intimate home activities in Portuguese. Another is what is called "pidgin," an extension of that lingua franca of the China, South Asiatic and Malayan coast cities in which the foreign residents conduct their personal and commercial relations with the lesser educated resident nationals. To this the Hawaiian people have added words and phrases assimilated from the Portuguese,

Hawaiian, Koreans and others. The testimony is that much of the intercommunication of children from homes where a foreign language is spoken is in this pidgin and that even some teachers use it in clarifying English words to their pupils. The third language is English.

With many of the children so using the three languages, the testimony of the defendants is that there is in the sixth grade a retardation in accomplishment of the school's curriculum of over six months behind that of similar schools on the mainland. The parties dispute as to the major cause causans. Plaintiffs, while not contesting the retardation, contend that pidgin and not the language schools is the principal cause. Defendants claim it is because of the language schools.

There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is an equivalent to that of the regular public schools. The defendants state the Act interdicts the teaching of even Latin or Greek to the children of the age and scholastic standing it seeks to affect, and we agree.

Before the attack on Pearl Harbor there were large schools teaching the Chinese and Japanese languages in the afternoon, after the regular schools had adjourned. These schools ceased teaching during the war. There is testimony that all of such Japanese schools have been permanently abandoned. Their buildings were voluntarily turned over to the government or charity organizations. The Chinese school plaintiffs now seek to resume such late afternoon teaching.

The extent of the education of children in the Chinese language prior to the war with Japan is shown by the admission of the defendants' answer that there were eight such schools employing more than fifty teachers. It is a proper inference that the three plaintiff schools seeking to resume teaching will have many pupils of above the average intelligence of the legislative finding.

The Act with its finding and prohibitory provisions shows on its face a denial of the right to acquire a foreign language to that half, or nearly half, of Hawaiian children of more than "average intelligence." Reinforcing this is the testi-

mony of defendants' principal pedagogical expert that some children from homes speaking a foreign language "are so far behind the others that if our teachers are to have a chance to bring them up to standard, up to standard of the mainland, they can't have the additional handicap of trying to learn another language or else they will never—or else too many of them will never speak good English. *Of course, the bright ones will.* But the children who are about the average, *about half of the children in any group are below average*, so they can't do it with that . . ." (Emphasis supplied.)

In Hawaii there were 22,357 children in the first four grades. Construing the word "average" in its customary meaning as being derived from those above and below a standard, of these at least 10,000 above average intelligence, the brighter ones, are denied the right then to begin to acquire a foreign language even with a tutor at home.

We do not agree with the defendants that such a denial to the parents of such a large proportion of children of the constitutional right to secure a foreign language for them is warranted to secure the elimination of the harm it seeks to avoid for those of lesser ability. It is for the brighter ones that there is the greater gain in such attainment—a gain not only in personal mental growth and satisfaction and in increased business opportunities but, now, in opportunities in service to his government's need of foreign language experts in its international intercourse.

Where such a fundamental right is destroyed by statute, it is not incumbent upon the wronged party to show that it could have been drawn so as to prevent the evil sought to be cured in the conduct of others. Thornhill *v.* Alabama, 310 U. S. 88, 99, and cases there cited. Hence we are not required to explore the area of legislation in which pedagogical standards may be created by which these children of average and less than average intelligence could be segregated from the others and such prohibitory restraint applied to them.

While it is apparent that the three plaintiff schools will have pupils of above such average intelligence and hence would be deprived of their constitutional right, its funda-

mental character gives them the right to contest the legislation even if they were not shown to be about to teach such pupils. It is enough that the statute shows on its face such an invalid deprivation. Thornhill *v.* Alabama, supra 101; Lovell *v.* Griffin, 303 U. S. 444, 452; Smith *v.* Cahoon, 283 U. S. 553, 562; Schneider *v.* State, 308 U. S. 147, 161.

There is no merit in defendants' contention that under the saving clause of the statute [7] it is inapplicable to plaintiffs or that it contemplates an enforcement only against children of average intelligence. It applies to *all* persons systematically teaching two pupils and to *all* children as well as those of average or less than average intelligence. Its provisions are not divisible in either of these essential respects.

We hold and declare the statute to violate the due process clause of the Fifth Amendment and order the issuance of the injunction prayed for.

(S.) WILLIAM DENMAN,
United States Circuit Judge.
(S.) PAUL J. McCORMICK,
United States District Judge.
(S.) DELBERT E. METZGER,
United States District Judge.

---

[7] "Section 7. (Saving Clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

APPENDIX VI

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT AND TERRITORY OF HAWAII

CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO, *Plaintiffs*,

vs.

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., and W. H. LOPER, *Defendants*

Assignment of Errors

Rhoda V. Lewis, Assistant Attorney General, Territory of Hawaii; Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorneys for Defendants.

To the District Court of the United States in and for the District and Territory of Hawaii.

Come now INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR. and W. H. LOPER, each individually and respectively as Governor of the Territory of Hawaii, Attorney General of the Territory of Hawaii and Superintendent of Public Instruction of the Territory of Hawaii, who are the defendants in the above entitled cause, and in connection with their appeal to the Supreme Court of the United States from the final amended judgment of the District Court of the United States in and for the District and Territory of Hawaii, entered the 13th day of February 1948, jointly and severally make and file the following assignment of errors upon which they will rely in their prosecution of the said appeal from the said judgment, and say that in the record, proceedings, and judgment therein, manifest error has in-

terfered, to the prejudice of said defendants as follows, to-wit:

1. The court erred in denying defendants' motion to dismiss.

2. The court erred in overruling defendants' "Defenses in Law."

3. The court erred in denying defendants' motion to strike plaintiffs' supplemental pleading.

4. The court erred in holding that the complaint sufficiently alleged that as to each of the plaintiffs Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association (hereinafter called the plaintiff school corporations), the matter in controversy exclusive of interest and costs exceeded $3,000.

5. The court erred in holding that the plaintiff school corporations, or any of them, had made sufficient showing that the matter in controversy exclusive of interest and costs exceeded $3,000.

6. The court erred in finding and deciding that by virtue of the passage of Act 104 of the Session Laws of Hawaii 1943, Chapter 31 of the Revised Laws of Hawaii 1945 (hereinafter called the statute), and its enforcement as threatened by defendants, each of the plaintiff school corporations will be irreparably damaged in an amount in excess of $3,000 or any other amount.

7. The court erred in holding that the complaint stated a claim for injunctive relief against the enforcement of the statute.

8. The court erred in permanently enjoining said defendants from enforcing or attempting to enforce the statute against the plaintiff school corporations and Leong Nget Cho, or any of them.

9. The court erred in adjudicating and declaring the rights of the plaintiffs there being no right to declaratory relief when the case was not a proper one for equitable relief.

10. The court erred in placing its own construction on the statute when the courts of the Territory of Hawaii had not construed the statute nor had an opportunity to do so, and there were easy and ample means for determining the issues of territorial law in the courts of the Territory of Hawaii.

11. The court erred in failing to confine its consideration to the case or controversy presented by the intended application of the statute by the defendants under their interpretation thereof.

12. The court erred in failing to confine its consideration to the case or controversy presented by the pleadings, and in considering hypothetical cases.

13. The court erred in holding that the hypothetical case of the tutoring of two or more children in the home in the doctrines of Confucius was to be considered, and that the supposed case of such tutoring was not divisible from the case presented by the plaintiff school corporations.

14. The court erred in failing to presume the statute constitutional.

15. The court erred in failing to so construe the statute as to sustain its constitutionality.

16. The court erred in failing to give due weight to the findings made by the legislature in the statute.

17. The court erred in failing to give due weight to the legislature's prerogative of resolving a conflict of opinion as to the harmful effects of bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent) in English and Oriental languages.

18. The court erred in failing to give due weight to the existence of peculiar language problems in the Territory of Hawaii which are detrimental to the accomplishment by the Territory of its objective of universal education in the basic school studies.

19. The court erred in failing to give due weight to the relation of the Territory of Hawaii to the children of said Territory, as parens patriae.

20. The court erred in failing to give due consideration to the powers of the Territory of Hawaii to protect the health and welfare of the children in said Territory.

21. The court erred in holding the statute unconstitutional, and at the same time holding it to be unnecessary to decide or pass upon plaintiffs' contention that the legislature of Hawaii has no power to deny to any child the right to acquire a foreign language in his infancy.

22. The court erred in failing to give due weight to the reasonableness of the statutory requirements in the light of the facts.

23. The court erred in failing to give due weight to the evidence of prevailing educational practices in the Territory of Hawaii and throughout the world.

24. The court erred in interpreting the legislative findings contained in the statute as findings relating to the mean average of children, to-wit, half the children of the Territory of Hawaii in the first four grades of school.

25. The court erred in failing to give due weight to the findings of the legislature, contained in the statute, as constituting findings relating to all children in the Territory of Hawaii in their early and formative years, except those of unusual intelligence who even before passing the fourth grade are so clearly proficient in the English language as to attain a test score of at least 5.0 on standard tests in composition and in reading.

26. The court erred in failing to find that in the Territory of Hawaii, save in exceptional cases, bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent), in English and Oriental languages, materially interferes with the accomplishment of their education in the basic school studies, and with their health and welfare.

27. In the face of conflicting evidence as to the interference of bilingual instruction of very young children (children who have not yet passed the fourth grade or its

equivalent), in English and Oriental languages, with the accomplishment of their education in the basic school studies, and with their health and welfare, plaintiffs having produced evidence in an endeavor to show that there is no such interference save in exceptional cases, and defendants having produced evidence in an endeavor to show that there is such interference save in exceptional cases, the court erred in finding such interference in one half of the cases, this being a finding unsupported by the plaintiffs' evidence or the defendants' evidence.

And such error amounted to a failure to resolve the conflict in the evidence.

28. The court erred in finding and deciding that of 22,357 children in the first four grades, at least 10,000 are of such intelligence that the learning of a foreign language prior to passing of the fourth grade will cause no detriment to them in their general education, their health, or otherwise.

29. The court erred in finding and deciding that of 22,357 children in the first four grades, at least 10,000 are of such intelligence that there is no pedagogical or other reason why they should be prohibited from being taught Chinese in the plaintiffs' schools.

30. The court having erroneously found and decided that approximately 10,000 out of 22,357 children in the first four grades are of such intelligence that the learning of a foreign language prior to passing of the fourth grade will cause no detriment to them, further erred:

In failing to consider and give due weight to the fact that plaintiff school corporations offer no instruction in the basic school studies and hence the supposed group of 10,000 children could not secure a complete education by attendance at their schools.

In assuming without evidence thereof that this supposed group of 10,000 children could be instructed in the basic school studies, in the public schools and in private schools offering such basic school studies, without detrimental interference arising from the necessity of

also instructing in the basic school studies the remaining 12,357 children who, even under the court's erroneous finding, are handicapped by bilingual instruction in the first four grades.

In finding and deciding that the parents of the supposed group of 10,000 children of superior intelligence were deprived by the statute of their right to have them taught a foreign language, it being erroneous to assume that their supposedly superior intelligence would not equally ameliorate the supposed burden of the statutory requirements.

31. The court erred in holding that the statute deprives the parents of more than 10,000 children of their right to have them taught a foreign language, the reasonable regulations of the statute not constituting a deprivation of such right, assuming without conceding that the rights of parents were entitled to be considered.

32. The court erred in passing upon the constitutionality of the statute in the light of the rights of parents, when it had held that presence of the jurisdictional amount in controversy was necessary to consideration of such rights.

33. It was error for the court to make any finding concerning, or to consider, the alleged rights of parents who were not parties to the cause, or the alleged rights of the plaintiff parents WAH-CHAN THOM and WILFRED CHONG, who were dismissed from the action.

34. The court erred in adjudging the statute unconstitutional as to the plaintiff school corporations without considering the extent of actual interference in the conduct of schools by said corporations which enforcement of the statute would cause.

35. The court erred in making findings and conclusions as to the rights of children, there being no children before the court as parties to the cause.

36. The court erred in holding the statute wholly unconstitutional.

37. The court erred in failing to separately pass upon the reasonableness of the following statutory requirements, and in failing to consider each as divisible from the others:

(a) The requirement that a teacher of a foreign language to a child under the age of fifteen shall demonstrate that he is reasonably well versed in the usage and idiom of such foreign language.

(b) The requirement that a teacher of a foreign language to a child under the age of fifteen shall demonstrate that he is reasonably well versed in the usage and idiom of the English language.

(c) The requirement that a student under the age of fifteen, in order to undertake the study of a foreign language, shall have passed the fourth grade in public school or an equivalent course of study.

(d) The requirement that students under the age of fifteen who have not yet passed the eighth grade and who are studying or about to undertake the study of a foreign language, may be required to demonstrate, by a standard test as defined in the statute, that they have such proficiency in English as must be attained by other students in the same grade in order to pass in English studies.

And the court erred in failing to uphold as constitutional each and every of the foregoing statutory requirements.

38. The court erred in permanently enjoining defendants from interfering with the teaching by the plaintiff school corporations and LEONG NGET CHO, or any of them, of foreign languages on the ground or grounds:

That the pupils being taught have or have not passed any grade in the public schools or its equivalent;

That the pupils being taught have or have not passed any tests in English composition or reading;

That the pupils being taught are or are not of certain age.

And as to each of the said matters it constituted error for the court to so enjoin the defendants.

39. The court erred in permanently enjoining defendants from interfering with the teaching by plaintiff school corporations and LEONG NGET CHO, or any of them, of foreign languages on the ground that any teacher teaching foreign languages has not been examined or certified by a Board of Examiners.

40. The court erred in holding that the plaintiff school corporations are entitled to teach foreign languages in their schools to students:

Regardless of whether said students have or have not passed any grade in the public schools or its equivalent.

Regardless of whether said students have or have not passed any tests in English composition or reading.

Regardless of the age of said students.

And as to each of the said matters it constituted error for the court to so hold.

41. The court erred in holding that the plaintiff school corporations are entitled to hire to teach foreign languages to their students, regardless of age, teachers who have not been examined or certified by a Board of Examiners:

As to their versatility in the usage or idiom of the English language.

As to their versatility in the usage or idiom of the foreign language to be taught.

And as to each of said matters it constituted error for the court to so hold.

42. The court erred in holding that the plaintiff LEONG NGET CHO, is entitled to follow his profession as a teacher of foreign languages and teach children regardless of their age without having been examined or certified by a Board of Examiners:

As to his versatility in the usage or idiom of the English language.

As to his versatility in the usage or idiom of the foreign language to be taught.

And as to each of the said matters it constituted error for the court to so hold.

43. The court erred in finding and deciding that the plaintiff LEONG NGET CHO was able to secure a contract to teach Chinese at the Chinese language school owned by the plaintiff CHUNG SHAN CHINESE SCHOOL ASSOCIATION in 1943, there being no evidence thereof.

WHEREFORE, the said defendants pray that the said judgment and decree of the District Court be reversed with directions to dismiss the amended complaint filed in this cause.

Dated at Honolulu, Territory of Hawaii, this — day of April, 1948

Respectfully submitted,

INGRAM M. STAINBACK,
Governor of Hawaii.
By WALTER D. ACKERMAN, JR.,
Attorney General of Hawaii;
RHODA V. LEWIS,
Assistant Attorney General of Hawaii, and
THOMAS W. FLYNN,
Deputy Attorney General of Hawaii.
By WALTER D. ACKERMAN, JR.,
Attorneys for Defendants.